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210-248—66

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 901

ROUGH DIAMOND COMPANY, INC., AND A. G. PARSER INCORPORATED, PETITIONERS

v.

UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the United States Court of Claims (Pet. App. 1a–18a) is reported at 351 F. 2d 636.

JURISDICTION

The judgment of the Court of Claims was entered on October 15, 1965. The petition for a writ of certiorari was filed on January 12, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1255.

QUESTION PRESENTED

Whether petitioners, having taken advantage of 7 U.S.C. 1692 by bartering surplus industrial diamonds

for cotton owned by the Commodity Credit Corporation, may recover the monetary difference between the exchange rate they voluntarily accepted and the then prevailing world market price of that commodity.

STATUTES INVOLVED

Section 303 of the Agricultural Trade Development and Assistance Act of 1954, 68 Stat. 459, as amended, 7 U.S.C. 1692 and Section 203 of the Agriculture Act of 1956, 70 Stat. 199, 7 U.S.C. 1853, are set forth in the Appendix, *infra,* pp. 11–13.

STATEMENT

In the Spring of 1959, petitioners, two industrial diamond concerns, agreed to barter industrial diamonds for cotton under the program instituted pursuant to Section 303 of the Agricultural Trade Development and Assistance Act of 1954, 68 Stat. 459, as amended, 7 U.S.C. 1692, and Section 203 of the Agricultural Act of 1956, 70 Stat. 199, 7 U.S.C. 1853 (*infra,* pp. 11–13). The 1954 Act authorized the Secretary of Agriculture to "barter or exchange agricultural commodities owned by the Commodity Credit Corporation for * * * strategic or other materials of which the United States does not domestically produce its requirements * * *," provided that the Secretary "take reasonable precautions to safeguard usual marketings of the United States and to assure that barters * * * will not unduly disrupt world prices of agricultural commodities or replace cash sales for dollars." In the 1956 Act, the CCC was directed to utilize "its existing powers and au-

thorities * * * to encourage the export of cotton by offering to make cotton available at prices not in excess of" the world market price. The Act expressly authorized the Corporation, however, to "accept bids in excess of the maximum prices specified," provided that it "shall not reject bids at such maximum prices unless a higher bid is received for the same cotton." Owing to the response its barter program has enjoyed, it has been the CCC's announced practice to exchange cotton on a competitive bid basis (Pet. App. 35a–39a).

By letter dated December 24, 1958, the Barter and Stockpiling Division of the Department of Agriculture's Commodity Stabilization Service informed the major dealers in industrial diamonds, including petitioners, that the CCC would entertain offers to exchange industrial diamonds for its agricultural commodities. The letter detailed the conditions which would govern any resulting barters, including the requirement that the bartered commodities be exported and that their acquisition be in addition to normal cash sales of CCC's agricultural surplus (Pet. 18a–21a). In response to this letter, Parser and Routh Diamond respectively offered to barter approximately $2,245,000 and $4,740,000 in industrial diamonds for CCC-owned cotton (Pet. App. 21a, 22a, 27a). In urging acceptance of their offers, each petitioner gave assurance that the barter transactions, rather than displacing other sales of United States cotton, would serve to recapture a portion of the market which was then being serviced by foreign production (Pet. App. 25a–26a).

Since the inception of the program in 1956, it has been CCC's practice to determine its prices for the various available grades of cotton prior to the beginning of each marketing year, *i.e.*, August 1st, and to abide by those prices throughout the year. Until the latter part of 1958, those prices had generally remained roughly equal to prevailing market prices. At the time of the Department of Agriculture's solicitation and of petitioners' offers to barter, however, the prices at which cotton was being offered in various world markets were generally lower than those fixed as the CCC's exchange rate (Pet. App. 28a).

Petitioners were well aware of this disparity. As the trial Commissioner found (Pet. App. 29a):

> At the time plaintiffs made their offers and selected cotton for their barter commodity, they were familiar with the then current price disparity. However, plaintiffs' representatives had, especially through Rough Diamond's previous barter transactions, become familiar with cotton commodity dealings and plaintiffs had confidence that their agents would be able to move the cotton in foreign markets. When the original offers were made, plaintiffs' primary concern was divesting themselves of their large surplus diamond inventory accumulations, amounting to many millions of dollars, in which problem they were much more interested than in the cotton competitive situation. Even prior to its December 1958 offer, and going back to 1957, Rough Diamond, in an attempt to dispose of surplus diamond inventory, had submitted barter offers on a continuing basis to CCC. However, prior to the instant ones, no accept-

ances had been made which resulted in plaintiffs' having purchased any cotton from CCC during the 1958–59 marketing year.

On March 16, 1959, the CCC conditionally accepted petitioners' offers on the understanding that the bartered cotton must be exported by July 31, 1959, rather than December 31, 1959, as petitioners had proposed (Pet. App. 44a–45a). Thereafter, petitioners made "counteroffers" to obtain either an exchange rate equal to prevailing world prices or a postponement of their exportation deadline until after August 1, 1959.[1] In several conferences with representatives of the Department of Agriculture between March 24 and April 3, petitioners' counter-proposals were orally rejected (Pet. App. 55a–57a), formal rejection being made by letter of April 8. Fully cognizant of the terms set forth in CCC's letter of March 16 and "anxious to dispose of their large surplus diamond inventories" (Pet. App. 71a),[2] petitioners accepted the Corpora-

[1] On February 3, 1959, representatives of the Department of Agriculture were rebuked by a House appropriations subcommittee for their failure to lower cotton exchange rates in response to the declining world market. Thereafter, the Department issued a press release making it clear that, for the marketing year beginning August 1, 1959, those prices would be made comparable to prevailing world market values.

[2] In pertinent part, Finding No. 41 of the trial commissioner reads as follows (Pet. App. 71a–72a):

> One of plaintiffs' contentions is that, if they had known that the Secretary of Agriculture would not, during the balance of the 1958–59 marketing year, lower the CCC export floor price on its cotton to make it competitive with prices of comparable grades being offered in substantial quantities in foreign markets, they would not have confirmed the acceptances by CCC of their barter offers. The

tion's terms in full on March 25 and April 6 respectively. Although they could have withdrawn from the barter transactions at those times without incurring any penalties,[3] petitioners made no effort to do so. On the contrary, petitioner Parser subsequently requested permission to increase the amount of its barter contract (Pet. App. 63a–64a).

In the fall of 1959, petitioners refused to execute formal contracts embodying their previous agreements unless the CCC would agree to an exchange rate equal to world market prices. At that point, the Corporation indicated it would invoke the penalty

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record is, however, insufficient to sustain this contention. It does instead indicate that plaintiffs were so anxious to dispose of their large surplus diamond inventories, which they had expressly accumulated for barter transaction purposes, that they would have proceeded with the transactions in any event. They entered the foregoing barter transactions voluntarily, and were not coerced or misled into doing so. No effort was ever made by plaintiffs to rescind any of the transactions or to obtain a reformation on the grounds of mistake, mutual or otherwise, with respect to the cotton prices. The record indicates no reply by plaintiffs to CCC's letters of April 8, 1959 (finding 28(b)), rejecting the Hynds proposals. Plaintiffs were prepared to accept some loss on the cotton in any event. Even if CCC cotton for export were purchased at competitive prices in foreign markets, no profit could be made on the transaction because of the costs that would have to be incurred in moving the cotton into the foreign markets. Thus, plaintiffs never contemplated making any profit on the cotton part of the barter transactions. The cotton was simply a device for converting their diamonds into dollars.

[3] At those times, neither petitioner had proffered any diamonds, and only petitioner Parser had purchased cotton. Had Parser decided to withdraw the nominal purchase already made, however, that purchase would have been treated as a cash sale.

provisions of the previous agreements. Petitioners then executed formal contracts under protest and brought this suit.

The Court of Claims held that even if the Secretary had violated the Act's pricing requirement, a question which it did not decide, petitioners voluntarily agreed to barter on the basis of higher exchange rates and therefore may not recover the asserted overpayments.

ARGUMENT

The court below did not reach the general question which petitioners seek to raise here, *i.e.*, whether the Secretary of Agriculture violated 7 U.S.C. 1853 by bartering CCC commodities at rates in excess of prevailing world market prices. Instead, it properly rested its decision on the particular facts of the present case—specifically the voluntary nature of petitioners' undertakings. In these circumstances, further review is not warranted.

1. In order to participate in the barter program and thereby be able to dispose of their industrial diamond stockpiles, petitioners voluntarily accepted the exchange rate established by the CCC. As we have noted (*supra*, pp. 5, 6), petitioners were advised repeatedly that the exchange rate would not be lowered prior to the date on which they were obligated to export the bartered cotton. Although they were free, upon receipt of that information, to withdraw without incurring any penalties, they chose to abide by their undertakings, and petitioner Parser actually increased its diamond offerings.

Having reaped the benefits of full execution by the CCC, petitioners—relying on *Maxwell* v. *Griswold*,

51 U.S. (10 How.) 241, *Swift Co.* v. *United States*, 111 U.S. 22, and *United States* v. *Edmondston*, 181 U.S. 500—now seek to be relieved of an integral portion of their agreements. But those cases indicate no more than that involuntary overpayments must be repayed by the government. Voluntary overpayments, on the other hand, generally need not be reimbursed. Thus, in *Edmondston*, a purchaser of public land who had paid more than the governing statute required sued for the overpayment in the Court of Claims. Viewing the overpayment as the result of a mutual mistake of law, this Court held that, since it was "a voluntary payment * * * the claimant's remedy is by appeal to the discretion of Congress and not by an action in the Court of Claims" (111 U.S. at 515).

As the court below properly held, the question in this case is factual—whether petitioners' undertakings were voluntary.[4] Resolving this question ad-

[4] Contrary to petitioners' suggestion (Pet. 13), the decision below is not in conflict with the series of Court of Claims decisions arising out of the disposition of government vessels following World War II. See Pet. App. 5a–6a. *Edmondston* was properly distinguished in the ship-sale cases where the governing maritime statutes evinced "the Congressional wish that 'the Government's surplus ships should be sold at prices, uniform for all purchasers, and ascertainable by mathematical application of the statutory formula * * *'"—a purpose deemed "'strong enough to override any general legal doctrine, applicable in other situations * * *'" (Pet. App. 6a). Whereas, in those cases, the ship purchasers were clearly the intended beneficiaries, here the statute plainly is intended to benefit American farmers, not cotton exporters. Rather than to provide any particular price to exporters, it is intended to recapture the United States' historical share of the world cotton market. See S. Rep. No. 1966, 84th Cong., 2d Sess. 7; 102 Cong. Rec. 8347, 8484–8488, 8826–8827.

versely to petitioners, the court held (Pet. App. 17a–18a):

> In short, plaintiffs were neither coerced nor misled. The end result of the negotiations was plaintiff's acceptance, in the spring of 1959, of a cotton exchange agreement based on prevailing CCC prices for the 1958–1959 marketing year. Having voluntarily agreed to these terms, Rough Diamond and Parser got what they ultimately bargained to receive, and they are entitled to no more.

2. In addition, we submit that the actions of the Secretary of Agriculture did not violate 7 U.S.C. 1853. The purpose of that Act, expressly stated in the statute itself, is to "reestablish and maintain the fair historical share of the world market for United States cotton, said volume to be determined by the Secretary of Agriculture." To accomplish this end, the CCC was directed to be competitive by making its cotton available at rates comparable to the world market price. At the same time, the Corporation was expressly authorized to accept bids in excess of the world price. It is apparent from these provisions that Congress intended that the CCC should realize as favorable a return as possible without jeopardizing the ability of domestic producers to enjoy their "fair historical share of the world market."[5] Peti-

[5] This double objective is borne out by the legislative history. See 102 Cong. Rec. 8484–8485. As the court below observed (Pet. App. 10a):

> Throughout the consideration of Section 203, the main objective was to sell a fair share of American cotton. If that could be done only at the going world price the Secretary was to proffer the cotton at that rate, but if enough

tioners do not, and cannot, claim that, because of its pricing policy, the CCC frustrated this basic purpose of the Act.[6]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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MARCH 1966.

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sales could be made at a higher level Congress did not forbid receipt by the CCC of the increment. There were, of course, references in the debates to the world rates as the prices the Agriculture Department would charge (see *e.g.*, 102 Cong. Rec. 8347, 8483–87), but the presupposition always was that this was the means by which this country would regain its "historical share" of the cotton market. The prices were not the end in themselves.

[6] Indeed, notwithstanding its failure to remain "competitive," the CCC was not lacking for invitations from industrial diamond merchants who were in a position to guarantee the exportation of any cotton received through barter (see Pet. App. 15a).

APPENDIX

Section 303 of the Agricultural Trade Development and Assistance Act of 1954, 68 Stat. 459, as amended, 7 U.S.C. 1692, provides:

> Sec. 303. The Secretary shall, whenever he determines that such action is in the best interest of the United States, and to the maximum extent practicable, barter or exchange agricultural commodities owned by the Commodity Credit Corporation for (a) such strategic or other materials of which the United States does not domestically produce its requirements and which entail less risk of loss through deterioration or substantially less storage charges as the President may designate, or (b) materials, goods, or equipment required in connection with foreign economic and military aid and assistance programs, or (c) materials or equipment required in substantial quantities for offshore construction programs. He is hereby directed to use every practicable means, in cooperation with other Government agencies, to arrange and make, through private channels, such barters or exchanges or to utilize the authority conferred on him by section 4(h) of the Commodity Credit Corporation Charter Act, as amended, to make such barters or exchanges. In carrying out barters or exchanges authorized by this section, no restrictions shall be placed on the countries of the free world into which surplus agricultural commodities may be sold, except to the extent that the Secretary shall find necessary in order to take reasonable precautions to safeguard usual marketings of the

United States and to assure that barters or exchanges under this Act will not unduly disrupt world prices of agricultural commodities or replace cash sales for dollars. The Secretary may permit the domestic processing of raw materials of foreign origin. The Secretary shall endeavor to cooperate with other exporting countries in preserving normal patterns of commercial trade with respect to commodities covered by formal multilateral international marketing agreements to which the United States is a party. Agencies of the United States Government procuring such materials, goods, or equipment are hereby directed to cooperate with the Secretary in the disposal of surplus agricultural commodities by means of barter or exchange. The Secretary is also directed to assist, through such means as are available to him, farmers' cooperatives in effecting exchange of agricultural commodities in their possession for strategic materials.

Section 203 of the Agriculture Act of 1956, 70 Stat. 199, 7 U.S.C. 1853, provides:

Sec. 203. In furtherance of the current policy of the Commodity Credit Corporation of offering surplus agricultural commodities for sale for export at competitive world prices, the Commodity Credit Corporation is directed to use its existing powers and authorities immediately upon the enactment of this Act to encourage the export of cotton by offering to make cotton available at prices not in excess of the level of prices at which cottons of comparable qualities are being offered in substantial quantity by other exporting countries and, in any event, for the cotton marketing year beginning August 1, 1956, at prices not in excess of the minimum prices (plus carrying charges, beginning October 1, 1956, as established pursuant to Section 407 of the Agricultural Act of 1949) at which cottons of comparable qualities

were sold under the export program announced by the United States Department of Agriculture on August 12, 1955. The Commodity Credit Corporation may accept bids in excess of the maximum prices specified herein but shall not reject bids at such maximum prices unless a higher bid is received for the same cotton. Cottons of qualities not comparable to those of cottons sold under the program announced on August 12, 1955, shall be offered at prices not in excess of the maximum prices prescribed hereunder for cottons of qualities comparable to those of cottons sold under such program, with appropriate adjustment for differences in quality. Such quantities of cotton shall be sold as will reestablish and maintain the fair historical share of the world market for United States cotton, said volume to be determined by the Secretary of Agriculture.

U.S. GOVERNMENT PRINTING OFFICE:1956